United States Court of Appeals

for the Second Circuit

INTERVENOR'S BRIEF

ORIGINAL

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CIVIL ACTION NO. 76-4278

REA EXPRESS, INC., BANKRUPT,
C. ORVIS SOWERWINE, TRUSTEE IN BANKRUPTCY,

Petitioners, et al.,

vs.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,

Respondents, et al.

ON PETITION FOR REVIEW OF ORDER
OF INTERSTATE COMMERCE COMMISSION

REPLY BRIEF OF INTERVENOR, ALLTRANS EXPRESS U.S.A., INC.

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The Respondents, the United States of America and the Interstate Commerce Commission have narrowed the issues here to those set forth in Intervenor Alltrans' brief, viz., whether the Commission acted arbitrarily and capriciously in dismissing REA's application for permanent authority and cancellation of temporary authority. As a side issue, Respondents suggest that Intervenor could always seek a new temporary authority under 49 U.S.C. § 310a(a).

Treating the latter contention first, it is submitted that it should not concern this Court that the Commission finds it "puzzling" why Alltrans seeks to succeed to the position of REA (Br., p. 14). Congress did not

create the Interstate Commerce Commission to make management decisions for those subject to its regulation. Secondly, the question was irrelevant. The only proposal before the Commission was for Alltrans to resume a service, not to institute a new service, which would have required affirmative proof of urgent and immediate need for authority everywhere throughout the entire nation. Section 210a(a), 49 U.S.C. § 310a(a), of the Interstate Commerce Act does not offer a realistic basis for the Alltrans' proposal. The difference was sufficient to warrant Alltrans in offering $9.6 Million for the Trustee's authority.

Respondents' gratuitous suggestion does not meet the issue here. In Eagle Motor Lines, Inc. v. Interstate Commerce Commission, 545 F. 2d 1015 (5th Cir. 1977), the Commission suggested that Petitioner, having been deprived of gateway elimination authority, could file a new application to demonstrate consistency with the public interest (a situation analogous to that here). The Court rejected the suggestion holding that such a procedure would misallocate the burden of proof. Alltrans, should it follow the Commission's suggestion, would be faced with an entirely different burden of proof, as it has on so many occasions informed the Commission. To illustrate the futility of following the Commission's suggestion, we suggest that the Commission inform the Court as to why it ignored the requests of approximately 2,000 members of the public to grant the temporary and permanent authority in the Alltrans case, docketed in MC-F-13003. Clearly, a § 210a(a) proposal would have been met with the same indifference as the § 210a(b) application which was on file with the Commission prior to its

decision in this case, and the grant of which would have mooted all issues before this Court.

Respondents request that this Court give to the Commission great deference with respect to the construction of its own regulations, specifically 49 C.F.R. 1100.247(f). We would expect the Court to do no less. But this does not mean that the Commission cannot be charged with or found to have abused its discretion in applying those regulations, and to have acted arbitrarily or capriciously, where, as here, the stated factual predicate for application of the regulation does not exist. It is not the regulation, but the abuse of discretion in the utilization of the Commission's regulations to which this appeal is directed. It is true that the construction placed on an agency's governing statute and its regulations is entitled to deference by the courts. But that construction must have a reasonable basis in law. The Court cannot be merely a rubber stamp for the affirmance of capricious administrative decisions. It is clear that the Commission has not, in the past, subjected carriers under its jurisdiction to the harsh measures applied here. The technical construction of the Commission's Rule 247(f) must at least be consistent with prior actions. The Court will note that the Commission's prior actions in cases similar to the one now before the Court have been consistently remedial and not punitive. As the Supreme Court stated in Federal Maritime Commission v. Seatrain Lines, 411 U.S. 726 (1973), prior cases of the Commission do not demonstrate the sort of long-standing, clearly articulated interpretation of the statute which would be entitled to great judicial deference. The Commission has cited no case

that it has decided under Rule 247(f) in which an application was dismissed for want of prosecution, much less where, as here, the factual predicate for application of the rule is wholly conjectural. As stated on Initial Brief, it is clear that if an applicant fails to appear in response to a hearing order, the applicant does not intend to prosecute the application and the application is properly dismissed. See Wellington Wells Watkins Contract Carrier Application, 2 M.C.C. 309 (1937). But where, as here, an applicant has responded to every order of the Commission, we urge that the technicality utilized by the Commission is arbitrary, capricious and an abuse of discretion.

The Commission's misapplication of Rule 247(f) is further seen in the fact that the Commission itself recognized the viability of the Sub 2314 application when, in January of 1975, it consolidated that case with 192 other applications and re-designated it as Sub 2345, Part 181. The Commission has yet to point to a requirement, and there is no requirement, that an applicant take affirmative action to request a hearing on any application it intends to prosecute. The filing of the application intrinsically includes a request for determination under the applicable procedures. Clearly, applicant does not control the Commission's calendar. Only the Commission could assign the application for hearing. Not only did applicant stand ready at all times to prosecute the application, but, two months prior to any Commission decision in the case now before this Court, the applicant and Intervenor Alltrans submitted a lengthy, and, we believe, a complete, joint proposal for prosecution of the pending applications. Even if there had been a failure to prosecute, it was cured prior to any action by the Commission.

In the face of the Commission's recognition in January, 1975, of the continued viability of the Sub 2314 "Hub" application, Respondents continue to insist that, in REA Express, Inc. Application For Emergency Temporary Approval, 117 M.C.C. 80 (1971), REA had -- 4 years earlier -- repudiated the theory involved in the permanent "Hub" application, and thereby conceded that it would not prosecute that application. Apart from its stultification by its former action, the Commission's conclusion has no rational connection with the facts. REA simply stated in the cited proceeding that if its application to convert from a regular to an irregular route operation were granted, it would relinquish all of its regular-route authority, including the "Hub" authority. The fact is that the conversion application was denied, the regular-route authority was not relinquished, and REA continued operating under the "Hub" temporary authority for the next four years. Contrary to Respondents' contention, there was no repudiation in 1971 which would rationally lead one to the conclusion — either in January, 1975 or in December, 1976 — that REA would not prosecute the application in question. Moreover, the only affirmative action taken with respect to a hearing on the Sub 2314 "Hub" application, from the time of applicant's statement of readiness at the Prehearing Conference in 1970 until the consolidation order of January 1975, was taken by applicant. No action whatsoever was taken by the Commission with respect to a hearing during the entire period of 6 years following the Prehearing Conference. It was arbitrary and capricious for the Commission to abruptly dismiss applicant's application for non-action, when the responsibility lay with the

Commission, not with the applicant. Thus, the primary ground asserted for cancellation of the temporary authority disappears.

Respondents' other arguments for cancellation are likewise without merit, wholly apart from the fact that they were not raised in the petitions for cancellation. First, Respondents fail to distinguish Pan Atlantic Steamship Corporation v. Atlantic Coast Line Railroad Co., 353 U.S. 436 (1957). They say that the Supreme Court did not find temporary authority to be a license beyond the reach of the Commission's summary process (Br., p. 21). But the Court did in fact specifically conclude that "licensee", as used in the sense of § 9(b) [5 U.S.C. § 558(c)], includes one who holds a temporary permit under 49 U.S.C. § 411(a) (353 U.S. at 439). Either temporary authority -- in this case of many years standing — is a license protected by § 9(b), or it is not. It being a license, as held by the Court, it is not subject to what the Respondents call the "Commission's summary process". The "summary process" is not permitted under 49 U.S.C. § 312a(a), and it is not permitted under § 9(b) of the Administrative Procedure Act. Fundamental administrative fairness requires that Respondents inform this Court the basis for the use of a "summary process". Respondents totally fail to articulate that basis or any valid rationale for the use of this doubtful summary power.

This Court has recognized that the policy behind the third sentence of § 9(b) of the Administrative Procedure Act is to protect those persons who already hold regularly issued licenses from the serious hardships occasioned both to them and to the public by expiration of the license before

the agency finds time to pass on its renewal. See County of Sullivan v. Civil Aeronautics Board, 436 F. 2d 1096 (2nd Cir. 1971). In depriving applicant of such protection, the Commission has acted outside its enabling statute as well as the Administrative Procedure Act. The summary dismissal and revocation were acts which § 9(b) of the Administrative Procedure Act was designed to prohibit. We respectfully request that the Court so find.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, J. WILLIAM CAIN, JR., hereby certify that I have this 25th day of March, 1977, served the foregoing Reply Brief of Intervenor Alltrans Express U.S.A., Inc., upon all parties of interest with respect to this matter, by mailing a copy thereof, properly addressed, with First Class postage, prepaid, to each of the following:

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